

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1356

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

Docket No.
77-1356

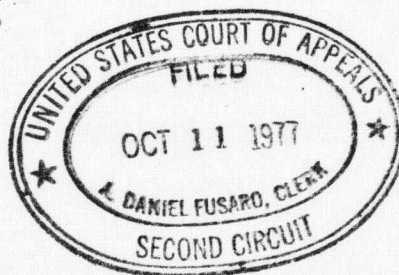
-against-

HERIBERTO C. HERNANDEZ,

Appellant.
-----X

=====
APPENDIX
=====

B
P/S



PAGINATION AS IN ORIGINAL COPY

EJB:GWS:om
F.#721,070

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

72CR 108

UNITED STATES OF AMERICA

INDICTMENT

-against-

NYDIA NEGRON HERNANDEZ and
HERIBERTO C. HERNANDEZ,
a/k/a Mr. & Mrs. Rivera, ✓

Defendants, ✓

Cr. No. _____
(T.21, U.S.C. §841(a)(1) and
T.18, U.S.C. §2)

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ JAN 27 1972 ★

THE GRAND JURY CHARGES:

On or about the 13th day of January 1972, ^{TIME AM} _{PM} _____
La Guardia Airport, Queens, New York, within the Eastern
District of New York, the defendants NYDIA NEGRON HERNANDEZ
and HERIBERTO C. HERNANDEZ, also known as Mr. & Mrs. Rivera,
knowingly and intentionally did possess with intent to
distribute approximately 122.2 grams of heroin, a Schedule I
narcotic drug controlled substance; approximately 54,068.8
micrograms of Lysergic Acid Diethylamide, a Schedule I
narcotic drug controlled substance; and approximately 127.5
grams of cocaine, a Schedule II narcotic drug controlled
substance.

(Title 21, U.S.C. §841(a)(1) & Title 18, U.S.C. §2)

A TRUE BILL

Harold H. Fabrice
Foreman

United States Attorney
Eastern District of New York

①

Form DJ-195
(Ed. 2-7-66)

No. _____

UNITED STATES DISTRICT COURT
EASTERN District of NEW YORK
Division

THE UNITED STATES OF AMERICA

vs.

NYDIA NEGRON HERNANDEZ and
HERBERTO C. HERNANDEZ
a/k/a Mr. & Mrs. Rivera

INDICTMENT

T.21, U.S.C. §841(a)(1) and
T.16, U.S.C. §2

A true bill,

Foreman.

Filed in open court this _____ day
of _____, A. D. 19____

Clerk.

Ball, § _____

FILED

TITLE OF CASE

THE UNITED STATES

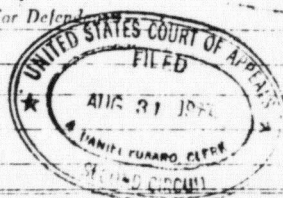
NYDIA NEGRON HERNANDEZ and

HERIBERTO C. HERNANDEZ,
a/k/a Mr. & Mrs. Rivera

For U.S.

3416

For Defendant



ABSTRACT OF COSTS	AMOUNT	DATE	CASH RECEIVED AND DISBURSED		
			NAME	RECEIVED	DISBURSED
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Fitnesses,					

DATE	PROCEEDINGS
1/27/72	Before DOOLING, J. - Indictment filed.
EB 3 1972	Before NEWMAN, J. - Adj'd to 2-10-72 on consent.
B 10 1972	Before COSTANTINO, J. Case Called - Defts & attys present. Defts arraigned and each enters a plea of not guilty. Bail cont'd.
2-15-72	Magistrate's file 72M73 inserted into criminal file.
2/25/72	Notice of Motion filed for inspection and suppression (HERIBERTO C. HERNANDEZ) - ret. 3/3/72.
2/29/72	Notice of Motion filed for suppression (NYDIA NEGRON HERNANDEZ)
3-3-72	Before ROSLING, J. - Case called - Defts & attorneys present. Marked ready (preferred) Custody. Bail continued as to Deft HERNANDEZ.
3-3-72	Before ROSLING, J. - Case called - Adjourned to 3-10-72 at 2:15 PM.
3-9-72	Notice of Readiness for Trial by the United States filed.

(over)

A

()

72CR 100

- 3-10-72 Before ROSLING, J. - Case called - No appearance on behalf of the attorney and deft HERIBERTO C. HERNANDEZ. Marked off.
- 3-22-72 Before ROSLING J - Case called - Deft HUMBERTO HERNANDEZ & counsel present - deft NYDIA HERNANDEZ not present - (reported ill) but counsel Edward Kelly of Legal Aid present. - Bail reduced to \$2500 cash or surety on application of counsel Allen Lashley for deft Humberto Hernandez - Case marked ready & passed.
- 3-28-72 By Schiffman, Magistrate - Order for acceptance of cash bail filed (deft Heriberto Hernandez)
- 4-10-72 File 72M683 inserted into criminal file. (Judge has file).
- 4/30/73 Before BARTELS, J.- Case called-Deft N.N. HERNANDEZ and counsel present- Set down for trial on 6/25/73
- 6-25-73 Before BARTELS, J- Case called - Defts & counsel present - Trial set down for 8-14-73.
- 8/14/73 Before BARTELS, J.- Case called- Defts and counsel present- Defts motion suppress- Hearing begun- Defts rest on motion- Hearing adjd to 8/15/73 at 10:00 A.M.
- 8-15-73 Before Bartels J - Case called - defts & counsels present - motion to suppress denied - Trial begun - Jurors selected and sworn - Jury returns with a verdict of guilty as to both defts. Jury polled - Jury discharged - Motions by defts for dismissal - Denied - Bail for both defts continued until 8-16-73.
- 8-16-73 Before Bartels J - Case called - defts & counsels present - Govts motion for an increase in bail to \$10,000 surety - decision reserved & bail contd until 8-29-73 at 9:30 am for hearing.
- 8-16-73 Voucher for expert services filed (Nydia Negron Hernandez)
- 8-20-73 Voucher for Expert Services filed (Heriberto C. Hernandez)
- 8/29/73 Before BARTELS, J. Case called- Deft not present-Bench Warrants ordered for both defts.
- 9/11/73 Voucher for compensation of counsel filed (NYDIA HERNANDEZ)
- 9/18/73 Voucher for expert services filed- HERIBERTO HERNANDEZ
- 11-9-73 Before BARTELS, J.- Case called- Defts not present- Bench warrants order (BOTH DEFTS)
- 11-13-73 Memorandum of Nov. 9, 1973 filed from Paul Bergman Asst US Atty to Marshal Benjamin Butler etc.
- 11-15-73 2 stenographers transcripts filed (page 1 to 361)
- 6-25-74 Voucher for compensation of counsel filed (HERIBERTO HERNANDEZ)
- 1/19/76 By BARTELS, J.- Copy of order setting case for status report on 2/10/76 fil

-76 Before BARTELS, J - case called - Govt reports that as of 2-...
U.S.M.S. is continuing investigation - fugitives - last
reported in Indiana - status report set down for 6-2-76

6-28-76 Before BARTELS, J - case called - Govt reports deft Lydia
Hernandez a fugitive - adjd to Oct. 19, 1976 for status report.

10/19/76 Before BARTELS, J. - Case called. Govt reports deft Nydia Hernandez
still a fugitive. Case adjd to 3/15/77 for status report.

7-14-77 Before BARTELS, J - case called - deft HERIBERTO HERNANDEZ &
counsel K. Kaplan present - deft sentenced to imprisonment for
3 yrs plus special parole term of 3 yrs in addition to such
term of imprisonment.

7-14-77 Judgment & commitment filed - certified copies to Marshal.
(HERIBERTO HERNANDEZ)

7-14-77 Notice of appeal filed. (no fee) Docket entries and duplicate
of notice mailed to the court of appeals. (Heriberto Hernandez)

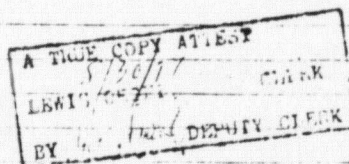
7-21-77 Voucher for compensation filed forwarded to Washington for
payment (Hernandez)

7-28-77 Certified Copy of Judgment and Commitment returned and filed
from Marshal. Deft. delivered on 6.29.77 to M.C.C. New York.
(HERIBERTO C. HERNANDEZ)

8-12-77 Judgment & commitment retd and filed - deft. Hernandez del.
to Eglin AFB, Fla.

8-29-77 Scheduling order filed that the record on appeal be docketed
on or before 9-7-77.

8-30-77 Record on appeal certified and mailed to the court of appeals



1
2 MR. BERGMAN: So far as the Ninth Circuit
3 decision that Mr. Lashley is citing right now,
4 there are portions of it which the government
5 can very easily embrace.

6 MR. CHREIN: As far as the Schneckloth --

7 THE COURT: What do you mean "embrace"?

8 MR. BERGMAN: I think the Anderson case
9 supports the government in this case.

10 MR. CHREIN: As far as the Schneckloth
11 case, that case was decided before the Ruiz-
12 Estrella case, and in the opinion of Ruiz-
13 Estrella, the Court does take notice of that
14 case involving an automobile search and dis-
15 tinguishes airport hijacker selectee searches
16 from that situation.

17 THE COURT: That's quite different. The
18 point of saying you do not have to be searched
19 if you do not wish to board the plane has not
20 been highlighted in the manner in which you have
21 indicated. What I am saying is there is no
22 magic words that have to be used. We must use
23 common sense. It must be obvious to anyone,
24 it seems to me, in view of these signs up that
25 if they want to board the plane, they are going

1
2 to have to be searched. Other than a moron, even
3 a person with very little intelligence, would know
4 that if he didn't want to be searched, he had a
5 right not to be searched by simply walking away
6 from the gate and not boarding the plane.

7 Now, we don't live in a vacuum and I have
8 great difficulty, indeed, to find that a person
9 does not know that he has a right to refuse to
10 be searched by simply saying "I'm not going to go
11 on the plane," that's all. What kind of world
12 are we living in? Everybody knows, it seems to
13 me, that if he doesn't want to be searched, all
14 he has to do is refuse to go on the plane.

15 MR. LASHLEY: You are dealing here with a
16 person who we don't know if she speaks or under-
17 stands English and a Puerto Rican.

18 THE COURT: I don't live in a vacuum.

19 MR. CHREIN: The same objective facts con-
20 cerning the warnings embodied in the posted
21 signs existed in two cases that I have already
22 cited in this Circuit and in which the signs
23 were found --

24 THE COURT: I will look at it and let
25 you know tomorrow morning. I am inclined,

1
2 gentlemen, to deny your application for
3 suppressing of the evidence, and the reasons
4 are that these defendants did meet the profile;
5 they were designated as selectees.

6 They were then asked for identification
7 and could not furnish such identification.
8 There were signs up in Spanish and English which
9 indicated that they would be searched for weapons
10 if they boarded the plane. They were told by
11 Mr. Mooney if they wished to board the plane,
12 they must pass through the magnetometer.

13 It seems to me it made it quite clear
14 that if they wanted to be cleared for the flight,
15 that's what they had to do. The inference, of
16 course, was that if you don't want to do it,
17 you won't be cleared for the flight.

18 Now, that was an option open to them.
19 They decided, when they had that option, to go
20 through the magnetometer. When they did, it
21 showed, as far as the husband was concerned, a
22 positive reading. He was then asked if he
23 minded if the marshal patted him down. He
24 wasn't patted down automatically. He there-
25 upon consented, according to this testimony,

1
2 to be patted down. When the patdown took place,
3 hard articles, such as cartridges, were felt in
4 his left pocket. He was then asked what he had
5 in there and to bring them out and he brought
6 them out and he said they were two .38 live
7 cartridges which were introduced into evidence
8 here.

9 At that time, Mrs. Hernandez was asked to
10 pass through the magnetometer with two bags, one
11 an ordinary carry-on airline bag and the other
12 was her suede bag, out of which there appeared
13 to be a purple blazer. She was asked if she
14 minded if the bag was searched. She said, "here,
15 take it."

16 He pulled out the blazer; he found a hard
17 substance or bag at the bottom, and it turned out
18 to be a brown bag which I felt, you felt, was
19 hard, was solid, to use his phraseology, and
20 thereupon in opening it and while he looked in
21 there, he saw tin foil bags, he saw some
22 cellophane bags and thereupon the husband said,
23 "This is mine, it's heroin and cocaine, let her
24 go, it's mine."

25 Now, he was, of course, then arrested and

1
2 so was she. At a subsequent search, they dis-
3 covered that he had also \$4,179.95 upon him.
4 His bags, I think, were justifiably searched
5 thereafter. When they were brought off the plane,
6 they were found to contain a .38 caliber pistol
7 loaded, I think, with three rounds of ammunition,
8 and a .32 caliber pistol.

9 What I am saying is that I believe that
10 the patdown was reasonable under the circumstances
11 and was consented to and it disclosed these
12 cartridges, and also I am saying that from the
13 testimony it seems to me that the examination
14 of Mrs. Hernandez' pocketbook was consented to
15 and it disclosed heroin.

16 It seemed to me this justified the arrest
17 of both of them and, of course, the subsequent
18 search of Mr. Hernandez disclosed \$4,179.95 and
19 the subsequent search of the bags disclosed
20 these weapons. The latter will not be admissible
21 in this case at all.

22 But I can't see, offhand, why this isn't
23 a proper search, and I would be inclined to say
24 that I will deny the motion to suppress.

25 I will go over those cases again early

1
2 tomorrow morning. I could be wrong, but it's
3 my impression that from the cases I have read,
4 this motion should be, and I will say will be,
5 denied unless there are further modifications
6 tomorrow morning at a quarter to ten.

7 Tell the jury we will see them tomorrow
8 morning at ten.

9 You can be here at half-past nine.

10 MR. CHREIN: Can I just direct your Honor
11 to one page on Ruiz-Estrella.

12 MR. LASHLEY: It's page 4167.

13 THE COURT: I am sorry to rush away.
14 Generally, I would be more specific.

15 Do you have anything to say? Maybe Mr.
16 Bergman wants to argue about the point.

17 MR. BERGMAN: Not at this point.

18 MR. CHREIN: I think that what Mr. Lashley
19 wants to call your attention to is that on page
20 4167 it states, in the Second Circuit decision,
21 in a case, that "nor can the posters be relied
22 on for such a showing. Even putting to one side
23 the government's concession at argument that it
24 does not rely on the posters, it is clear that
25 the posters could not alert passengers to their

(A recess was taken and the jury was excused.)

(The jury entered the jury box.)

(The following was the Charge of the Court.)

THE COURT: Ladies and gentlemen of the jury:

You have listened most attentively to the testimony and the summations of the attorneys. Now, the testimony presented the facts through the witnesses and the exhibits. The summations presented the arguments of the attorneys, pro and con, concerning those facts.

The time has come, ladies and gentlemen, for you and for me to perform our respective functions in the trial of this case. You have heard the voices of the attorneys and the Court and now your voice will be heard.

This has been a short case, but I wish to take this opportunity to extend my deep appreciation for your attentiveness and your alertness during the course of this trial and also my appreciation for the sacrifice which each and every one of you has made in neglecting your business and your personal affairs to see that the ends of justice might be accomplished

1
2 in this case.

3 Now, every criminal prosecution is important
4 to the government of the United States, and it is
5 equally important to the defendants on trial. Each
6 is entitled to equal justice at your hands.

7 From my experience, justice is best dis-
8 pensed of in a calm, patient, careful and delib-
9 erate manner and I sincerely hope you take this
10 attitude throughout your deliberations when you
11 return to the jury room. Of course, you should
12 always respect the viewpoints of your fellow
13 jurors. You should talk to each other with con-
14 sideration and intelligence and decide the
15 issues in this case on the merits and on the
16 merits alone.

17 You have heard the evidence. You have
18 heard the arguments of counsel, and it now
19 becomes my duty to give you the law governing
20 this case, and as I indicated before at the
21 beginning of the trial, it is your duty to
22 accept the law as it is given to you by the
23 Court and to determine the facts of the case
24 for yourselves. The proper application of the
25 law of the case to the facts of the case as you

1
2 find them will determine your verdict.

3 I wish to make it plain to you that the
4 sole responsibility and the sole power in deter-
5 mining the facts are with you, and anything that
6 I may say, or seem to say, as indicating any view
7 or opinion as to the facts is to be ignored by you.

8 In determining the facts, you should not
9 be influenced by any rulings that the Court may
10 have made during the trial. These rulings dealt
11 with matters of law and not questions of fact.

12 The Court's ruling on an objection made
13 by any of these attorneys and any questions which
14 the Court may have posed to any witness are not
15 to be considered by you as indicating either the
16 guilt or the innocence of these defendants. The
17 same is true with respect to any inflection of
18 the Court's voice relative to any such matters
19 or in connection with any comments or statements
20 the Court may have made to these attorneys.

21 The Court expresses no opinion as to the
22 guilt or innocence of these defendants. The
23 determination of such guilt or innocence is a
24 matter which rests exclusively with you.

25 There are some general principles of law

1
2 which are of importance in every criminal case, and
3 I wish, first, to make some statements which apply
4 to criminal cases in general, after which I shall
5 endeavor to make clear to you what this particular
6 case involves.

7 It is an established principle that an
8 indictment is but a formal method of accusing a
9 defendant of a crime. It is not evidence of any
10 kind against the accused, and it does not create
11 any presumption or permit any inference of guilt
12 against either of these defendants.

13 It is also a principle well recognized in
14 law that every person who is charged with the
15 commission of a crime is presumed to be innocent
16 and the burden rests on the government to prove
17 to your satisfaction beyond a reasonable doubt
18 every element of the crime and that the party is
19 guilty as charged. This presumption of innocence
20 remains with the defendants all through the case
21 until, if ever, it is overborne by proof which
22 satisfied you beyond a reasonable doubt that the
23 presumption of innocence no longer remains with
24 them.

25 Thus, you look at all the evidence

1
2 introduced in this case and you ask yourselves
3 whether or not you are satisfied beyond a reason-
4 able doubt that the offenses have been committed
5 as charged in the indictment. If you are so sat-
6 isfied, then it will be your plain duty to con-
7 vict the defendants who have committed these
8 offenses. But if there exists in your minds a
9 reasonable doubt of a defendant's or defendants'
10 guilt, you must give that defendant, as the case
11 may be, the benefit of that doubt and acquit
12 that defendant as the case may be.

13 In this case, there is more than one
14 defendant and you must consider the innocence or
15 the guilt of each defendant separately, and this
16 is very important.

17 If there are two reasonable conclusions,
18 equally supported by the evidence, one of which
19 is consistent with the guilt of a defendant and
20 the other consistent with his or her innocence,
21 then you must adopt the conclusion which is
22 consistent with innocence and acquit him or her
23 as the case may be.

24 The question of reasonable doubt is one
25 which can be determined only by you. It cannot

1
2 be determined by arguments or opinion of counsel.
3 In reaching a conclusion with respect to a
4 reasonable doubt, you must consider all of the
5 evidence together not just a particular segment
6 or portion of the evidence isolated from the
7 rest of the evidence.

8 The term "reasonable doubt" as used in
9 this charge does not mean just any possible
10 doubt you might have, but it means such a
11 reasonable doubt as a careful, prudent and
12 reasonable man or woman ought to entertain in
13 the circumstances proved. It means a doubt based
14 on reason, and which is reasonable in view of
15 all of the evidence. The key word is "reason-
16 able." A reasonable doubt may arise from the
17 evidence produced or from the lack of evidence
18 in the case. It is the obligation of the gov-
19 ernment to prove a defendant guilty beyond a
20 reasonable doubt, but it is not required to prove
21 a defendant guilty beyond a shadow of a doubt.
22 It is rarely possible to prove anything to an
23 absolute certainty or beyond all possible doubt.
24 Seldom can one prove a controversial fact with
25 mathematical certainty. A reasonable doubt

1
2 does not mean a vain, fanciful, vague or whimsical
3 or imaginary doubt, nor does it mean a possible
4 doubt created by a reluctance on the part of
5 the jury to perform an unpleasant task. It means
6 a doubt arising out of the evidence or the lack
7 of the evidence which is a reasonable doubt. A
8 reasonable doubt is a doubt that would cause
9 prudent men to hesitate before acting in matters
10 of importance to themselves. One is said to be
11 convinced in a case of this kind beyond a
12 reasonable doubt when, after an impartial com-
13 parison and consideration of all the evidence, one
14 can conscientiously say that he or she is con-
15 vinced to a moral certainty of the truth of
16 the charge.

17 If there is a reasonable doubt in your
18 minds about the guilt of a particular defendant
19 on the charge in the indictment, he or she, as
20 the case may be, is entitled to the benefit of
21 that reasonable doubt and to an acquittal on
22 those charges.

23 If, on the other hand, you think a parti-
24 cular defendant's guilt is clear beyond a reason-
25 able doubt, then you must find him or her, as

1
2 the case may be, guilty as charged.

3 Now, the machinery of trial calls for the
4 exercise of various functions by counsel and by
5 the witnesses who testify, by the Court that pre-
6 sides, and by the jury. Now, you, as the jury,
7 exercise the fact-finding function.

8 As you have been told, you are the sole
9 judges of the facts. That is to say, it is you
10 who must consider the evidence, you weigh the
11 evidence, and you draw inferences from the evi-
12 dence, but only from the evidence.

13 You must distinguish between the mere
14 arguments of counsel which have been made before
15 you and the evidence or lack of evidence upon
16 which those arguments rest. The repetition of
17 an argument, however often, does not constitute
18 evidence. You must carefully analyze the
19 assertions which have been made to you by counsel
20 for the defendants and by counsel for the gov-
21 ernment and ascertain what basis those assertions
22 have in the evidence.

23 This brings us directly to the charges in
24 the indictment itself. I will read those charges.
25 They are both against Nydia Negron Hernandez

1
2 and Heriberto C. Hernandez and they read as
3 follows, that on or about the 13th day of January,
4 1972, at LaGuardia Airport, Queens, New York,
5 within the Eastern District of New York, the
6 defendants NYDIA NEGRON HERNANDEZ and HERIBERTO
7 C. HERNANDEZ, also known as "MR. & MRS. RIVERA,"
8 knowingly and intentionally did possess with
9 intent to distribute approximately 122.2 grams
10 of heroin, a Schedule One narcotic-controlled
11 substance, approximately 54,068.8 of micrograms
12 of lysergic acid diethylamide, otherwise known
13 as LSD, a Schedule One narcotic-controlled sub-
14 stance, and approximately 127.5 grams of cocaine,
15 a Schedule Two narcotic-controlled substance,
16 in violation of Title 21 USC, Section 841(a)(1)
17 and Title 18 USC, Section 2.

18 This last section, 18 USC Section 2, is
19 simply an aiding and abetting statute.

20 Let me read to you the pertinent portion
21 of Section 841(a)(1) of Title 21 of the United
22 States Code. Section 841(a) of Title 21 of
23 the United States Code claimed to have been
24 violated in this indictment reads in part as
25 follows:

1
2 "(A) Except as authorized by this sub-
3 chapter, it shall be unlawful for any person
4 knowingly or intentionally ...

5 "To distribute or dispense, or to
6 possess with intent to distribute, or dis-
7 pense, a controlled substance."

8 A controlled substance, as used in the
9 statute, is nothing more than a drug or substance
10 mentioned in one of the schedules set forth in
11 Section 812 of Title 21 of the United States
12 Code. Heroin, cocaine and lysergic acid diethy-
13 lamide are set forth in Schedule One of this
14 section, except cocaine is set forth in Schedule
15 Two of this section. In other words, the
16 statute prohibits the unlawful possession with
17 intent to distribute, or the unlawful distri-
18 bution of heroin, cocaine and LSD, with know-
19 ledge that it is heroin, cocaine and LSD.

20 Now, referring to the illegal possession
21 with intent to distribute a controlled substance
22 such as heroin-hydrochloride, cocaine and LSD
23 as set forth in this indictment, Section 841(a)(1)
24 of Title 21 of the United States Code provides,
25 as I indicated to you, that it shall be unlawful

1
2 for any person knowingly or intentionally to
3 possess with intent to distribute a controlled
4 substance, such as heroin-hydrochloride, cocaine
5 and LSD.

6 The elements of the offense as charged in
7 the indictment are (1) that the defendants
8 possessed a narcotic-controlled substance, such
9 as heroin-hydrochloride, cocaine or LSD, with
10 intent to distribute the same and (2) they did
11 so intentionally, wilfully and knowingly.

12 Now, the burden is upon the government
13 to prove, beyond a reasonable doubt, both of
14 these elements and failure to prove either of
15 the elements is fatal to the prosecution and
16 entitles the defendants to a verdict of
17 acquittal.

18 Now, we will go to the aiding and abetting
19 statute.

20 Section 2 of Title 18 of the United
21 States Code, referred to in the indictment,
22 places in the category of a principal offender
23 anyone who aids or abets an offender. This
24 section reads as follows and I will quote it:

25 "(A) Whoever commits an offense against

1
2 the United States or aids, abets, counsels,
3 commands, induces or procures its commission,
4 is punishable as a principal.

5 "(B) Whoever wilfully causes an act to
6 be done which if directly performed by him or
7 another would be an offense against the United
8 States, is punishable as a principal."

9 Now, this section is self-explanatory.

10 Thus, anyone, who does not commit the
11 offense himself but who aids or abets an offender
12 or causes an act to be done which if directly
13 performed by him would be an offense against
14 the United States, is a principal himself. In
15 other words, anyone who shares in the criminal
16 intent of the principal and is wilfully associated
17 with the venture in a way that by his action he
18 will participate or assist in bringing about the
19 ultimate result is, under this section, in the
20 same position as a principal.

21 Now, the burden is upon the government
22 to prove beyond a reasonable doubt that (1) there
23 was an offense committed against the United
24 States and (2) a particular defendant wilfully
25 aided and assisted in its commission, and the

1
2 are of the government to prove these elements
3 is fatal to the prosecution and will entitle the
4 defendants to a verdict of acquittal of this
5 charge of aiding and abetting.

6 There are two separate charges here, (1)
7 the possession with intent to distribute a nar-
8 cotic drug and (2) the charge of aiding and
9 abetting each other to commit this offense.

10 Now, this case has been a very, very
11 short case and I don't believe it's necessary for
12 me to marshal the evidence. You remember the
13 government charges that these two defendants
14 appeared at the United Airlines and bought a
15 ticket in the name of Rivera, Mr. and Mrs.
16 Rivera, from United Airlines and they were
17 designated as selectees under the hijacking
18 profile system. Thereupon, they were called
19 upon for identification as Riveras and could
20 not produce it. You recall that the marshal
21 was then requested to appear, and he did so,
22 and then these defendants were taken down from,
23 I think, Gate 15, where they were about to
24 board a plane to South Bend, Indiana, via
25 Cleveland, to Gate 18, where there was a

1
2 magnetometer, and they were told, as I believe the
3 evidence indicates, that if they wished to board
4 the plane and to be cleared, they would have to
5 go through this magnetometer.

6 They did go through the magnetometer and
7 there was a positive reaction of Mr. Hernandez
8 and then he was asked if he could be patted down
9 by the marshal and there was an affirmative
10 answer. Upon patting him down, the marshal dis-
11 covered there was a hard substance in one of
12 his back pockets which turned out to be two .38
13 caliber live cartridges. There was also a big
14 bulge in one of the front pockets which turned
15 out to contain \$4,179.00.

16 The wife was also asked to go through the
17 magnetometer and after doing so, there was a
18 positive reaction, and she was asked if she
19 minded if the marshal examined her carry-on
20 bags and she said, "Here it is," and so he
21 brought out a paper bag and while opening it
22 and looking into it, the husband said, "It's
23 mine, it's heroin, cocaine and let her go."

24 That is, as I recall, the claim of the
25 government. The defendants plead absolutely

1
2 "Not Guilty."

3 If I have made any misstatement in this
4 brief summary, why, please, disregard it. I
5 think that's in substance what the evidence
6 showed, but it is not my recollection of the
7 evidence. It is yours that counts. There is
8 no intention at this time or at any other time on
9 my part to try to repeat to you what the testimony
10 had been because it's your recollection which will
11 govern you in your deliberations.

12 My recital of the respective contentions
13 of the parties is not an indication of any
14 opinion that I might have because again I
15 must remind you that it will be your recollection
16 of the testimony that will control your deliber-
17 ations.

18 It was stipulated that there was cocaine
19 and heroin in the brown suede pocketbook of Mrs.
20 Hernandez. Her counsel argues that there was
21 no testimony that she knew that there was illegal
22 drugs in her pocketbook. As I said, the
23 defendants pleaded "Not Guilty."

24 The chief contention of her husband,
25 through his counsel, was that he did not have

1
2 possession of the narcotic drugs, and that the
3 chief defense of the wife, Nydia Negron Hernandez,
4 through her counsel, is that she did not know
5 that what she had in her pocketbook was narcotics
6 and she did not have any required criminal
7 intent.

8 Now, it is for you to decide these two
9 questions. If the government has failed to prove
10 beyond a reasonable doubt that the husband,
11 HERIBERTO C. HERNANDEZ, did not have possession,
12 constructive or otherwise, of the illegal drugs,
13 then, of course, you must acquit him. If the
14 government has failed to prove beyond a reason-
15 able doubt that the wife, NYDIA NEGRON HERNANDEZ,
16 did not know that she had possession of any
17 illegal drugs in her pocketbook, then you must
18 acquit her.

19 Now, neither of these defendants took the
20 stand. The law does not compel a defendant in a
21 criminal case to take the witness stand and
22 testify, and no presumption of guilt may be
23 raised and no inference of any kind may be drawn
24 from the failure of either of these defendants
25 to testify.

1
2 As stated before, the law does not impose
3 upon a defendant in a criminal case the burden
4 or any duty of calling any witnesses or producing
5 any evidence.

6 Let us talk about intent and knowledge.

7 The crimes charged in the indictment
8 require knowledge of and a specific intent to
9 commit these offenses. Specific intent implies
10 more than a general intent to commit the act.

11 It is obviously impossible to ascertain
12 or prove directly what a man knew or intended
13 unless, of course, he admits it himself, but
14 a careful and intelligent consideration of the
15 facts and circumstances which are shown by the
16 evidence in any given case as to a person's
17 actions and statements enables us to infer with
18 a reasonable degree of certainty and accuracy
19 what his or her intentions were in doing or not
20 doing certain things, and thus we are able to
21 have some evidence as to the state of his or
22 her knowledge.

23 Now, we cannot look into one's mind and
24 ascertain what knowledge or intent he had.

25 "Knowledge," as well as "intent," is descriptive

T 8

G M

1
2 of a state of mind, and as an element of the
3 offense, is seldom, if ever, susceptible of
4 direct proof. The proof of this element of
5 knowledge and intent may rest, as it frequently
6 does, on evidence of facts and circumstances
7 from which it clearly appears as the only
8 reasonable and logical inference that a defendant
9 knew that he or she was carrying contraband.
10 But, in determining knowledge and intent, you
11 may consider his or her intelligence or
12 sophistication or lack of intelligence or
13 sophistication. No person, however, can inten-
14 tionally avoid knowledge by closing his or her
15 eyes to the facts that would lead a reasonable
16 man to investigate. However, a mere suspicion
17 that something is wrong or improper, is not
18 equivalent to knowledge or intent. On the other
19 hand, knowledge and intent may be inferred from
20 the acts of the parties and it is a question of
21 fact to be determined from all the circumstances,
22 and the jury may scrutinize the particular
23 defendant's entire conduct at the time the
24 offenses alleged were committed.

25 Now, no person can disclaim knowledge

1
2 merely by closing his or her eyes intentionally
3 to facts which would otherwise have been obvious
4 to any reasonable person. If you find from all
5 the evidence beyond a reasonable doubt that Mrs.
6 Hernandez deliberately and consciously avoided
7 learning what, in fact, she was carrying in her
8 pocketbook for fear of discovering narcotics,
9 you may infer, but you need not be compelled to
10 do so, that she knew that she was carrying nar-
11 cotics. If you find that she knew that she was
12 carrying narcotics, you may further infer that
13 she was carrying these narcotics for the purpose
14 of distributing or causing the distribution of
15 same. The amount of narcotics covered, I think,
16 is an element which you may weigh very seriously
17 in reaching this conclusion or failing to reach
18 the conclusion. The circumstantial evidence
19 sufficient to support knowledge and intent must

20 be sufficiently persuasive, however, to
21 exclude the inference of innocence under the
22 circumstances.

23 Let us look for a moment at the assertion
24 by counsel for Mr. Hernandez that he did not
25 have possession of the illegal narcotics.

Charge

1
2 Possession may be actual physical possession
3 of the narcotic drug or it may be "constructive
4 possession."

5 "Constructive possession" means that
6 although a defendant did not actually have physical
7 possession of the narcotic drug, his or her
8 relationship with the narcotic drug is such
9 that he or she had dominion and control over the
10 narcotic drug. Under such circumstances, it is
11 said that a person had constructive possession
12 of the narcotic drug.

13 Mere presence at the place where the
14 narcotic drug was located or distributed is not
15 sufficient to charge the defendant with con-
16 structive possession. There must be some
17 relationship by the defendant with the narcotic
18 drug or the person having actual physical
19 possession of the narcotic drug.

20 The government's case against the
21 defendants rests upon both direct and circum-
22 stantial evidence. I think a word upon the sub-
23 ject of circumstantial evidence is in order.

24 Circumstantial evidence is evidence of a
25 fact from which you may reasonably infer the

1
2 existence or non-existence of another fact. For
3 example, if a person comes into your home wear-
4 ing a raincoat which is wet, carrying an umbrella
5 which is wet, that would be circumstantial proof
6 that it's raining outside, even though you did
7 not otherwise know it was raining.

8 Or, to give you another illustration,
9 perhaps a little closer to home here in the
10 courtroom, suppose the forelady were to ask Mr.
11 Nims here, who is the courtroom clerk, for a
12 pad and pencil to make notes, and suppose that
13 after you took a short recess you came back
14 and Mr. Metz, the Court Reporter, not Mr. Nims,
15 were to hand the forelady a pad, paper and
16 pencil, now that would be circumstantial evid-
17 ence that Mr. Nims, the courtroom clerk, had
18 given the forelady's message to Mr. Metz, the
19 Court Reporter. That would be circumstantial
20 evidence. That's simple.

21 As the words indicate, circumstantial
22 evidence means evidence involving circumstances
23 surrounding the incident and details as dis-
24 tinguished from direct personal observation.

25 Well, it is more than, and it is

1
2 fundamentally different than, mere conjecture or
3 speculation, for under our law no man can be
4 convicted on the basis of guesswork or speculation.

5 An inference that is reasonably drawn
6 from the facts testified to is evidence. A logical
7 inference is to be distinguished from mere spec-
8 ulation or mere suspicion.

9 Circumstantial evidence is legal and
10 acceptable evidence. It is that evidence which
11 tends to prove a disputed fact by proof of other
12 facts which have a legitimate tendency to lead
13 the mind to a conclusion that the fact exists
14 which is sought to be established. Circumstantial
15 evidence may consist of an accumulation of many
16 details which are so logically inter-related
17 and so consistent with each other and so
18 inherently probable that you may not have the
19 slightest doubt as to its truthfulness and
20 accuracy.

21 Circumstantial evidence must, however,
22 be so convincing that it leaves you with no
23 reasonable doubt. If you have a reasonable
24 doubt after you consider all the circumstantial
25 and other evidence as to any defendant, you must

1
2 acquit that defendant.

3 Now, generally, we have more than one
4 or two witnesses in a case, but in this case,
5 you only had two witnesses. I think perhaps
6 I might give you a few comments on the credi-
7 bility of witnesses.

8 In considering the evidence, you exercise
9 the exclusive function of passing upon the cred-
10 ibility of witnesses. I don't think, however,
11 it was contradicted that there was heroin found
12 here in the pocketbook of Mrs. Hernandez. Of
13 course, the other facts are to be determined
14 by you. How you are going to determine whether
15 a witness is telling the truth or is not telling
16 the truth is to be left to your own determination.
17 Among other things, in determining the credi-
18 bility of a witness, the jury may consider his
19 motive in testifying, his manner and demeanor
20 on the witness stand, his interest, his
21 prejudice or bias, if any, and whether he has
22 a purpose or interest to serve which might
23 color his testimony. Interest does not necessarily
24 mean that a witness is untruthful. It is
25 merely an element that you may consider, in

1
2 reaching your determination, upon the question
3 of whether he is telling the truth. You may
4 also consider whether a witness had the means
5 of knowing what he was testifying to and also
6 the inherent probability or improbability of
7 his testimony and the consistency or incon-
8 sistency of his statements, the reasonableness
9 or unreasonableness of his testimony viewed
10 in the light of all of the circumstances
11 surrounding this testimony. Another considera-
12 tion is whether or not the witness has been con-
13 tradicted by other credible evidence or
14 whether or not he has made statements at other
15 times and places, under oath or otherwise,
16 which are contradicted or contrary to those
17 made by him on the witness stand.

18 As to the latter, you should consider
19 whether any prior inconsistent or contradictory
20 statements conflict with the testimony given
21 by the witness on the witness stand with respect
22 to a material or immaterial matter and to what
23 extent, if any, they should be considered to
24 affect the witness' credibility.

25 The jury has a right, in appraising a

1
2 particular witness' testimony as to all or part
3 of his testimony, to consider the probability
4 or the improbability of that testimony when
5 viewed in the light of all the circumstances
6 and other evidence.

7 If you find that any witness has knowingly
8 testified falsely to a material fact, you may
9 disregard the entire testimony of that witness
10 or you may accept that which you believe to be
11 true and disregard the balance. If you disre-
12 gard his testimony altogether, and the guilt
13 of any defendant is dependent on such testimony,
14 then you may acquit such defendant.

15 Now, it is for you to determine whether
16 a witness, whoever he may be, is telling the
17 truth as to all the facts or only with respect
18 to some of the facts, or whether he is telling
19 the truth at all. The test as to whether you
20 believe a witness is the same test you apply
21 in your every-day business or in your home
22 affairs.

23 Now, do not think, ladies and gentlemen,
24 when you entered this jury box and were sworn
25 as jurors, that it was supposed you would lay

1
2 aside your business and your personal every-day
3 experience. That is not so. Indeed, you are
4 being called upon now to use that business and
5 every-day experience to assist you in deter-
6 mining whether there has been any conflict in
7 evidence in this case. You are the exclusive
8 judges in determining where the truth lies.

9 You have been chosen and sworn as jurors
10 in this case to try the issues of fact pre-
11 sented by the allegations of the indictment
12 and the denial made by the "Not Guilty" plea
13 of each of these defendants. You are to per-
14 form this duty without fear, without bias or
15 prejudice to any party. The law does not
16 permit jurors to be governed by fear or by
17 sympathy or by prejudice or by public opinion.
18 You must not permit any plea of sympathy to
19 enter your verdict. The accused and the public
20 expect that you will carefully and impartially
21 consider all the evidence and follow the law
22 as stated by the Court and reach a just verdict
23 regardless of the consequences.

24 In conclusion, let me say that it is your
25 duty to weigh this evidence carefully,

1
2 dispassionately, calmly and to reach a conclusion
3 about the case as to the facts which are wholly
4 within your findings.

5 The only question for your consideration
6 is whether the defendants are guilty or innocent
7 of the offense for which they are now on trial.
8 If you are satisfied beyond a reasonable doubt
9 that they are guilty, it is your plain duty to
10 convict them. If you have a reasonable doubt
11 about the matter, it is equally your plain duty
12 to acquit them.

13 As I indicated to you before, there are
14 two defendants here and their guilt or innocence
15 must be considered separately.

16 The punishment provided by law is a matter
17 exclusively within the province of the Court.
18 You cannot and you should not allow any consider-
19 ation of any punishment which may be imposed
20 on either defendant, if he or she is found
21 guilty, to influence you in arriving at an
22 impartial verdict as to the guilt or innocence
23 of the defendant.

24 It is for the Court to determine any
25 mitigating or any other special circumstances

1
2 which may require consideration in the case. So
3 you should not be concerned with the question of
4 punishment.

5 Now, ladies and gentlemen, all twelve of
6 you must agree, ~~whichever~~ way you find. In other
7 words, your verdict must be unanimous. You must
8 take the indictment and determine the guilt or
9 innocence of the defendants as follows. The
10 form of your verdict should be:

11 "We, the jury, find the defendant NYDIA
12 NEGRON HERNANDEZ not guilty as charged; or

13 "We, the jury, find the defendant NYDIA
14 NEGRON HERNANDEZ guilty as charged.

15 Do the same thing with the defendant
16 HERIBERTO C. HERNANDEZ.

17 Now, if you wish any testimony of either
18 of these witnesses to be read to you or if you
19 have any further questions, please send in a
20 note to the marshal who will relay your request
21 to me.

22 Of course, jury service is not always
23 pleasant and not everybody wishes to serve. But
24 jury service is the keystone of our system of
25 American justice and our democratic form of

1
2 government and I want to thank each and every
3 one of you for your devotion, as citizens, to
4 this important work as jurors and may you, in
5 accordance with the evidence in this case and
6 the law as I have given it to you, by your ver-
7 dict declare the truth and proclaim the cause
8 of righteousness in this case.

9 If you desire to examine any exhibit,
10 it will be delivered to you upon request, and
11 if after you have retired, you desire to be
12 informed on a point of law arising in the case
13 or to have any part of the testimony clarified,
14 you should ask to be returned to the Court for
15 further instructions.

16 Now, at this point, I will take a five-
17 minute recess in order that I may hear applica-
18 tions to be made by counsel. I will request
19 you not to consider this case or deliberate upon
20 it or comment upon it until you are brought back
21 at the end of this short recess, which will be
22 five minutes.

23 (A recess was taken and the jury was
24 excused.)

25 THE COURT: All right, gentlemen.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee

Docket No. 77-1356

-against-

HERIBERTO C. HERNANDEZ,

Appellant.
-----X

STATE OF NEW YORK)

COUNTY OF NEW YORK)SS.:

MICHAEL IRA ASEN, duly sworn, deposes and says:

1. That I am not a party to the action and am over 18 years of age.
2. I reside in the City and State of New York.
3. On October 10, 1977, I served the within Brief and Appendix upon the following at the address designated by said parties for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Clerk, United States Court of Appeals
For the Second Circuit
United States Courthouse
Foley Square, New York 10007

David G. Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Michael Ira Asen

*Sworn to before me on
October 10, 1977*

LYNN A. MOSER
COMMISSIONER OF DEEDS
City of New York No. 4-1856
Commission Expires Dec. 1, 1978
Lynn A. Moser